NO. 80-1027

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Respondent

BRIEF IN OPPOSITION TO CERTIORARI

Matthew Horowitz
1236 West Gray
Houston, Texas 77019
(713) 524-5925

Attorney for Respondent

OF COUNSEL:

Greater Houston Chapter
of the American Civil
Liberties Union
1236 West Gray
Houston, Texas 77019

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Jane Doe, Plaintiff/Appellee below, respectfully requests that this Court deny the petition for writ of certiorari filed by the officers of the Defendant University Interscholastic League.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Plaintiff is the "prevailing party" for purposes of an award of attorney's fees under 42 U.S.C. Section 1988 and 29 U.S.C. Section 794(b)?

2. Whether the Court of Appeals erred in vacating the preliminary injunction as moot and remanding the case to the district court for a determination of appropriate attorney's fees?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 622 F.2d 118. The opinion of the District Court is reported at 459 F. Supp. 1190. These opinions are reproduced in the petition of the University Interscholastic League with the exception of the appendix to the District Court's opinion which was omitted.

ADDITIONAL RELEVANT STATUTES AND REGULATIONS

29 U.S.C. § 749 (b) states:

> "In any action or proceeding to enforce a charge or violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Section IV (E) (5-6) of the Internal Operating Procedures Manual of the United States Court of Appeals for the Fifth Circuit states:

5. **Emergency Procedure**

   a. *Application*—Counsel having emergency motions should contact the Clerk's Office and not one of the judges of the Court. If counsel determines that his motion is of such nature as to require immediate submission to a judge or panel of the Court, he should at the time of filing his motion with the Clerk request in writing that the matter be immediately submitted.

   b. *Procedure*—The Clerk will immediately assign the matter to the next judge in rotation on the administrative-interim routing log and to his panel members. If the matter requires that counsel contact the initiating judge or panel members personally the clerk will advise the name of the initiating judge and the panel

members to whom the case is assigned, after first getting approval from the initiating judge.

The motion papers are distributed as described in paragraph 4(b) above, except that a complete set of the papers is forwarded to all members of the panel at their home offices.

6. *Motion to Expedite Appeal*—Motions for this relief should be presented in the same manner as other motions. An appeal may be expedited only by the Court and for good cause shown. If an appeal is ordered expedited, the Clerk will fix a briefing schedule which will permit the appeal to be set for oral argument at an early date, unless an earlier hearing date is directed by a judge. The Clerk will usually have some idea of the approximate date of the hearing and will so advise counsel when the order is issued.

Rule 8(a) of the Federal Rules of Appellate Procedure states:

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying or restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the

motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

Rule 27(a) of the Federal Rules of Appellate Procedure states:

(a) *Content of Motions; Response; Reply.* Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice and the court may shorten or extend the time for responding to any motion.

Rule 54(d) of the Federal Rules of Civil Procedural states:

(d) *Costs.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and

agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

STATEMENT OF THE CASE

Summary of the Proceedings

Plaintiff filed this action on August 7, 1978, claiming violations of her son's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (hereafter Section 504). Plaintiff alleged causes of action under Section 504 and 42 U.S.C. Section 1983. The District Court conducted an evidentiary hearing on August 11, 1978 and, on August 16, 1978, entered a preliminary injunction pending a full trial on the merits. The University Interscholastic League (hereafter the U.I.L.) perfected an appeal and, on July 21, 1980, the Fifth Circuit vacated the preliminary injunction as moot and remanded the case to the District Court for a determination of appropriate attorney's fees.

Statement of Facts

Plaintiff brought this action on behalf of her son, John Doe. At the time this suit was filed, John Doe was seventeen years old and was about to begin his senior year in high school.

Defendant Bailey Marshall is the Director of the U.I.L. The U.I.L. is an organization composed solely of public schools that is affiliated with the Bureau of Public School Services of The University of Texas. The U.I.L. is the rule-making and policy-making body for all interscholastic competition among public schools in the State of Texas. It is empowered to enforce compliance with its rules by various devices, including the suspension of non-complying schools from post-season tournament competition.

The U.I.L. is funded by dues assessments from its member public schools. Public schools in Texas pay the U.I.L. and operate their athletic programs out of their general revenue funds. These general revenue funds are financed, in part, by non-categorical federal grants.

John Doe resided with his parents in Friendswood, Texas, and attended the public schools in Friendswood until March, 1978. John Doe suffered from serious psychiatric problems which had been manifested in violent behavior directed toward his parents and in poor academic performance. After a series of particularly violent family episodes in late 1977 and early 1978, John Doe's psychologist recommended that he be removed from his parents' home. In March, 1978, John Doe began living with his grandparents in Alvin, Texas. He also began attending Alvin High School. Subsequent to this move, John Doe's emotional status, his performance in school, and his relationship with his parents improved markedly, and it was agreed that he should remain with his grandparents and continue to attend Alvin High for the 1978-79 school year.

John Doe played varsity football when he attended the Friendswood public schools and he wished to continue this activity at Alvin High School. Football was very important to John Doe and his mother believed that it was the primary factor that motivated him to remain in school despite academic problems and an inability to successfully interact with his peers. Moreover, John Doe's psychologist had concluded that his participation in football was therapeutically significant in that "it allows him an outlet for some of his tension and aggressive feelings in a very structured and controlled manner."

The Superintendent of John Doe's new school district did not object to his participation in the varsity football program. However, he advised Plaintiff to first contact the U.I.L. in order to accommodate the U.I.L.'s residency rule. That rule virtually precludes students from engaging in interscholastic

competition for one academic year where they have transferred schools and their parents do not reside in their new school district. The purpose of the rule is to prevent tampering by coaches and to deter disenchanted athletes from "shopping" for new schools.

Plaintiff conferred with U.I.L. officials about John Doe's eligibility status in the spring of 1978. She was informed that John Doe would be barred from participating in interscholastic athletics at Alvin High School.

On June 27, 1978, Plaintiff filed a complaint with the Office of Civil Rights of the Department of Health, Education, and Welfare (hereafter OCR), alleging that the U.I.L. was prohibiting John Doe from participating in interscholastic sports in violation of Section 504 of the Rehabilitation Act. Football practice was scheduled to begin in mid-August and when it became clear as of August 7 that OCR could not resolve this matter by the beginning of the football season, Plaintiff filed this lawsuit.

The District Court ruled that the athletic program at Alvin High School received federal funds; that John Doe was a "handicapped" individual within the meaning of Section 504; that, as a result of his handicap, he had a "legitimate and compelling" need to attend Alvin High and to be eligible for interscholastic competition; and that the U.I.L. could readily accommodate John Doe's special needs without jeopardizing the objectives that its residency rule was designed to address. For these reasons, the Court held that the U.I.L. had violated Section 504 and it entered a preliminary injunction restraining the Defendants from barring John Doe's participation in interscholastic sports.

John Doe played varsity football during the Fall of 1978 and graduated from high school in May, 1979. The U.I.L. did not attempt an expedited appeal and by the time its appeal was argued and decided in 1980, the controversy had become moot.

Plaintiff has filed a motion for attorney's fees with the trial court which is presently pending.

ARGUMENT

I. *The Court of Appeals correctly determined that John Doe is the "prevailing party" for purposes of an award of attorney's fees under 42 U.S.C. Section 1988 and 29 U.S.C. Section 794(b).*

A party who successfully sues a state agency pursuant to 42 U.S.C. Section 1983 and Section 504 ". . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 42 U.S.C. Section 1988; 29 U.S.C. Section 794(b). See e.g. *Criterion Club v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978); *Brown v. Culpepper*, 559 F.2d 274, 277-78 (5th Cir. 1979), citing Sen. Rep. No. 94-1011, 94 Cong., 2d. Sess., at p. 4., reprinted in 5 U.S. Cong. & Adm. News, pp. 5908, 5912 (1976). See also *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Where a court grants a preliminary injunction which secures the primary relief sought, the plaintiff is a prevailing party for purposes of an award of attorney's fees. See, e.g., *Iranian Students Association v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978); *Howard v. Phelps*, 443 F. Supp. 374 (E.D. La 1978); *Buckton v. NCAA*, 436 F. Supp. 1258 (D.Mass. 1977). See also Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. at p. 5, reprinted in 5 U.S. Cong. & Adm. News, pp. 5908, 5912-13 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., pp. 7-8 (1976). Cf. *Maher v. Gagne*, 100 S.Ct. 2570, 2575 (1980); *Robinson v. Kimbrough*, 620 F.2d 468, 475-77 (5th Cir. 1980); *Ross v. Horn*, 598 F.2d 1312, 1322 (3d Cir. 1979); *I.S.K.O.N. v. Andersen*, 569 F.2d 1027 (8th Cir. 1978).

The U.I.L. argues that these principles have been negated by this Court's decision in *Hanrahan v. Hampton*, 100 S.Ct. 1987 (1980). See also *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Crubbs v. Butz*, 548 F.2d 977 (D.C. Cir. 1976). In *Hanrahan*, the trial court directed a verdict for the state defendants in a civil rights action. The Seventh Circuit reversed, remanded for a new trial, and awarded the plaintiffs' attorney's fees. This Court reversed the award of fees because the plaintiffs had yet to prevail on any of their substantive claims. However, this Court emphasized that a final judgment is not a prerequisite to a fee award so long as the plaintiff secures some meaningful measure of the primary relief sought. 100 S.Ct. at 1989.

This Court's decision in *Hanrahan* was applied in an identical context to that at bar in *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), cert. petition pending, 49 U.S.L.W. 3457 (1980). In *Williams*, the plaintiff secured a preliminary injunction against policies of the San Francisco Police Department. The city appealed but, prior to oral argument, it became apparent that the challenged policies would not be reinstated even if the trial court's decision was reversed. The appellate court dismissed the case as moot, vacated the preliminary injunction, and remanded to the trial court. The trial court granted the plaintiff's motion for a fee award and the city again appealed. Relying on *Hanrahan*, the Ninth Circuit ruled that the preliminary injunction qualified the plaintiff as a "prevailing party" and that it was proper to enter a fee award without reviewing the appropriateness of the trial court's initial decision to grant preliminary relief. 625 F.2d at 847-48.[1]

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[1] The decision in *Smith v. University of North Carolina*, 633 F.2d 316 (4th Cir. 1980) is not to the contrary. In *Smith*, the plaintiff alleged that her termination from employment was tainted by race, sex, and age discrimination. She secured a preliminary injunction but ultimately lost after a trial on the merits. On appeal, the Fourth Circuit ruled that she was not entitled to a fee award for the preliminary relief since the initial order was intended primarily to preserve the status quo; she did not secure any measure of the desired remedy—i.e.,

Plaintiff filed this action to vindicate her son's right to participate in interscholastic football free of discrimination based on handicap. At the time suit was filed, it was apparent to the parties that, given the time parameters, the preliminary injunction motion would dispose of the merits. The District Court addressed the merits and granted Plaintiff a preliminary injunction after an evidentiary hearing that developed all the relevant facts. As a result, John Doe participated in interscholastic athletics until he graduated from high school. Since Plaintiff has secured all the relief she sought, she is a "prevailing party" under the logic of *Hanrahan* and all the relevant circuit court decisions.

II. *The Court of Appeals properly vacated the preliminary injunction as moot and remanded the case to the District Court for a determination of appropriate attorney's fees.*

Well before the time of oral argument, John Doe completed his interscholastic athletic career and graduated from high school. Pursuant to this Court's routine practice and in order to protect the rights of the Defendant U.I.L., the Court of Appeals vacated the preliminary injunction and remanded to the District Court for a determination of appropriate attorney's fees. See *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950); *Duke Power Company v. Greenwood County*, 299 U.S. 259, 267-68 (1936).

The U.I.L. now complains that the award of attorney's fees saves this case from mootness and entitles it to a final judgment on the merits. As attorney's fees under the relevant statutes

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reinstatement and backpay; and her employer was subsequently absolved of all culpability. The *Smith* Court carefully distinguished cases such that at bar where it is apparent to the trial court and the parties that, as a result of time pressures, a preliminary injunction hearing will dispose of the merits, and the trial court then reaches the merits after a complete evidentiary hearing and grants a preliminary injunction that secures the primary relief sought. 632 F.2d at 349. See *Kimbrough v. Arkansas Activities Ass'n*, supra, 574 F.2d at 426.

are awarded as a part of costs, the U.I.L.'s theory would mean that once a party prevails in any way in district court and becomes entitled to costs under Rule 54(d) of the Federal Rules Civil Procedure, the case could never become moot regardless the subsequent events and the loss of an actual controversy. See 42 U.S.C. Section 1988; 29 U.S.C. § 794(b). See also *Hutto v. Finney*, 437 U.S. 678, 696-98 (1978). Such a result would impose a serious burden on the already overcrowded dockets of the Courts of Appeals. It also runs directly counter to this Court's well-founded aversion to making advisory opinions and to directly addressing important public policy matters where the facts warrant a more narrow disposition. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

The decision of the Court of Appeals is a limited one. The Court held that where a case becomes moot on an appeal from an order granting a preliminary injunction, the fact that the plaintiff is entitled to costs and attorney's fees will not, per se, render the matter justiciable. See *Williams v. Alioto*, supra, 625 F.2d at 847-48. This holding is particularly appropriate where, as in the case at bar, the inevitability of mootness is readily forseeable but the defendant chooses not to avail itself of the standard procedures for an expedited appeal. See Rules 5, 8, and 27 of the Federal Rules of Appellate Procedure; Internal Operating Procedures Manual of the United States Court of Appeals for the Fifth Circuit at P. 5-6, 7-8. See also *United States v. Munsingwear*, supra, 340 U.S. at 40.

We conclude that the decision of the Court of Appeals was routine and correct, and that it is not of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Matthew Horowitz
1236 West Gray
Houston, Texas 77019
(713) 524-5925

Richard Larsen
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Respondent

OF COUNSEL:

Greater Houston Chapter
of the American Civil
Liberties Union
1236 West Gray
Houston, Texas 77019

CERTIFICATE OF SERVICE

I certify that on the 24 day of February 1981, I deposited three (3) copies of this brief in the United States Mail addressed to Ms. Laura S. Martin, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

Matthew Horowitz